In the United States of America
Before the National Labor Relations Board

Omni Hotels Management Corporation

Respondent

- and -

UNITE HERE Local 1

Charging Party

Case No. 13-CA-250528

Respondent's Answering Brief Pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations

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INTRODUCTION

The General Counsel's brief distorts both the facts of this case and Board precedent by asserting that Omni "maintain[ed] a practice of granting wage increases that [we]re fixed as to timing but variable in amount" and contending that Omni violated the Act by its "unilateral discontinuance" of that practice during negotiations for a first contract with the Union. To begin with, the stipulated record shows that, before the Union's election to represent bargaining unit employees, Omni sometimes awarded those employees a wage increase once a year, sometimes twice a year, and sometimes not at all. Sometimes, Omni awarded increases to some of those employees but not to others. Sometimes, the wage increases came in March, sometimes in April, sometimes in September, and sometimes in October. Most important, there was no set of fixed and predictable criteria that dictated the size, or even the existence, of any wage increases. Instead, the stipulated facts show that Omni made its wage increase decisions over the course of 15+ years before the Union's election based various considerations, with each of these considerations being more or less important (or, at times, not even considered at all) in any given year, depending on the circumstances. These considerations have included the budgeted, forecasted, and actual economic performance of the hotel, employees' individual job performance reviews, statutory minimum wage requirements, and wage rates offered by comparable hotels in the Chicago area. **Put another way, the undisputed facts show that Omni increased wages whenever it thought it should, by however much it thought it should, for whichever employees it deemed appropriate.**

In light of this history of exercising complete discretion over wage rates, Omni had no obligation to grant bargaining unit employees a wage increase on September 1, 2019.

Contrary to the General Counsel's arguments, an employer is not required to grant wage increases to newly represented employees while bargaining for a first contract just because the employer granted wage increases at roughly the same time of year for a few years before the union was elected. *See Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 412 n.3 (D.C. Cir. 1996) ("[W]e do not believe that fixed timing alone would be sufficient to bring the program under *Katz*."). Rather, the Board must consider whether the employer historically increased wage rates according to a set of objective, fixed criteria. *See id.* at 412 ("While the Board's precedent in this area has not always been a model of clarity, its decisions . . . indicate that, when an employer has established a regular wage-increase program **with fixed criteria**, even though discretionary in amount, that program cannot be discontinued unilaterally.") (emphasis supplied). Where the employer's historical wage increases have been completely discretionary, the employees' actual wage rates at the time of the union's election constitute the status quo, and they must be maintained while the potential for wage increases is relegated to the bargaining table and the parties' negotiations. That is precisely what Omni did here, and its actions did not violate the Act.

ARGUMENT

I. The Board Must Adhere To Supreme Court Precedent.

In *NLRB v. Katz*, 369 U.S. 736 (1962), the Supreme Court held that the employer violated Section 8(a)(5) of the Act in three ways during bargaining for an initial contract: (1) unilaterally announcing a change in its sick leave policy, (2) unilaterally instituting a new system of automatic wage increases, and (3) unilaterally granting merit increases. After finding that the unilateral changes with respect to the first two subjects "plainly frustrated the statutory objective of establishing working conditions through bargaining," the Court considered whether the employer's unilaterally awarded merit increases should be treated as lawful because they were consistent with a "longstanding practice" of granting such increases. 369 U.S. at 744, 746.

The Court firmly rejected the employer's "longstanding practice" defense because "[w]hatever might be the case as to so-called 'merit raises' which are in fact simply automatic increases to which the employer has already committed himself, **the raises here in question were in no sense automatic, but were informed by a large measure of discretion** . . . and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases." *Id.* at 746-47 (emphasis added). Owing to the discretionary, non-automatic nature of the merit raises, "the fact that the January raises were in line with the company's long-standing practice" did not "differentiate[] them" from the

unilateral changes to the sick leave plan and institution of an automatic wage increase that were also found unlawful. *Id.*

The Board has consistently adhered to these principles. In *State Farm Mutual Automobile Insurance Co.*, 195 NLRB 871, 889-90 (1972), and *Oneita Knitting Mills, Inc.*, 205 NLRB 500, 502-03 (1973), the Board held that unilateral wage increases were violations of the Act, even though the employer had a past practice of granting merit increases, because the employer's historical wage increases were informed by a significant degree of discretion.

The Board has reached a similar conclusion in cases involving other discretionary changes during negotiations for a first contract. For example, in one case, the employer failed to establish a past practice of recurring reductions of employees' work hours permitting it to continue that practice during bargaining because the alleged historical practice lacked a "'reasonable certainty' as to timing and criteria," and the employer's discretion to reduce hours "appear[ed] to be unlimited." *See Eugene Iovine, Inc.*, 328 NLRB 294, 294 (1999); *Adair Standish Corp.*, 292 NLRB 890, 890 fn. 1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990).

In sum, the Supreme Court's emphasis in *Katz* on the extent of employer discretion exercised when making prior unilateral changes must also be the foundation for the Board's decision in this case. In this regard, the Board has required "reasonable certainty" with respect to both "timing and criteria" before requiring an employer to continue granting wage increases during negotiations for

an initial contract. *Eugene Iovine, Inc.*, 328 NLRB at 294. There is no such certainty in the stipulated record presented to the Board here. On the contrary, the stipulated facts reveal an enormous amount of discretion in Omni's past decision-making. (Statement of Facts, ¶¶ 14-49.)

II. *Raytheon* and *Care One* Do Not Require Finding a Violation of the Act.

The General Counsel's brief directs the Board's attention to its previous opinions in *Raytheon* and *Care One* and argues that both decisions require a finding against Omni here, but this is not correct. To begin with, neither of those cases involved wage increases at all, and *Raytheon* did not involve first-contract negotiations. Furthermore, the General Counsel's argument based on these cases blurs the subtle but significant difference between a wage increase program with fixed timing and criteria that nonetheless "involves the exercise of discretion" (for example, an annual performance evaluation process based on specified metrics that still yields different wage increase amounts each year, based on the discretion of management to apply those criteria) and historical wage increases that are grounded completely in the employer's discretion, like the one presented to the Board in this case. As discussed in the previous section, the Supreme Court (and the Board) has held that an employer may not continue granting wage increases during first-contract negotiations based on such a history.

In *Raytheon*, under three consecutive collective bargaining agreements (2000-2005, 2005-2009, and 2009-2012), bargaining unit employees received coverage under the company's medical plan. During that time, non-unit employees were

covered by the same plan. Over the course of these agreements, and pursuant to contractual reservation-of-rights language in the agreements, each January the company modified the costs and/or benefits associated with the plan. The changes included increases in premiums, as well as changes in available benefits, medical options, deductibles and copayments. As the Board explained, "All of the changes were typical of the changes one regularly sees from year to year in cafeteria-style benefit plans." *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 21 (2017).

After the expiration of the parties' 2009-2012 contract, the company continued its practice of implementing annual changes to the medical plan for all employees. The implementation of the changes provoked an unfair labor practice charge from the union, which the Board rejected, finding that discretionary changes to the plan had become as much part of the status quo as maintenance of the plan itself. *Id.*, slip op. at 22-23. As part of its reasoning, the Board explained:

> [W]e believe the Board should recognize that the *Katz* holding—permitting unilateral employer actions that do not constitute a 'change' because they do not materially vary in kind or degree from actions taken previously—is sufficiently flexible to accommodate actions that involve significant complexity and thus require advance planning, provided, of course, that the employer acts consistently with its past practice. **These considerations are especially relevant in the instant case, given the existence of fixed annual enrollment periods, the participation by represented employees in benefit plans that applied throughout the company, and the lack of certainty when bargaining for a successor contract might resume, let alone conclude.**

Id., slip op. at 23 (emphasis supplied).

As an initial matter, it must be noted that the Board in *Raytheon* did not hold that the employer would have violated the Act by freezing the plan costs and benefits for represented employees while they negotiated for a successor contract. It held only that changing those items unilaterally was permitted under the particular circumstances of that case. If it is possible to analogize the *Raytheon* situation to this case, then Omni (like the employer in *Raytheon*) also was permitted under the logic of the Board's opinion to continue exercising its historical discretion with respect to the existence and size of any wage increase for bargaining unit employees. The fact that it exercised that discretion by deciding not to grant a wage increase is merely one of the various possible outcomes associated with possessing that level of discretion, and the Board can see from the stipulated facts that this has happened before: bargaining unit employees did not receive a wage increase in the fall of 2009 (Stipulation of Facts, ¶31), and some bargaining unit employees did not receive a wage increase for several years in a row (Stipulation of Facts, ¶¶ 22-43). At a most basic level, then, the *Raytheon* case does not require the outcome sought by the General Counsel here.

At any rate, there are a number of factors distinguishing this case from the *Raytheon* case. The *Raytheon* case involved bargaining unit employees participating in a typically complicated medical benefit plan along with non-unit employees throughout the company and 10 years of consistent changes to that plan made every January 1, pursuant to a contractually negotiated provision permitting such changes without bargaining. The Board in *Raytheon* specifically observed the

"particular need for certainty and predictability . . . when dealing with medical benefits." *Raytheon*, supra, slip op. at 23. No such complex considerations are present with respect to simple wage increases, there is no 10-year history of changes being made on the same date each and every year, and Omni was not operating in the wake of an expired contract that had granted it the right to make annual changes in wage rates without negotiating over those increase with the Union. *Raytheon* is simply not applicable here.

The General Counsel's brief also cites *Care One at New Milford*, 369 NLRB No. 109 (2020), which reversed the Board's previous decision in *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016). In *Total Security Management*, the Board had held that, during bargaining over a first contract, an employer must bargain with the union regarding discretionary "serious discipline" (such as suspension, demotion, or discharge). Reversing that case, the Board in *Care One* held that an employer does not have an obligation to bargain over discipline (even where the employer exercises discretion in imparting it) if it is given in accordance with an established disciplinary framework. *Care One*, supra, slip op. at 7. Only in passing and by way of example does the Board even discuss wage increases, stating that "when an employer has an established practice of granting raises every year, *Katz* prohibits the employer from materially deviating from that practice without affording the union notice and an opportunity to bargain." *Id.*, slip op. at 5. This is obviously mere dicta when it comes to wage increases and the meaning of *Katz*. As discussed in some detail above, the holding

of *Katz* and subsequent Board decisions following *Katz* is more nuanced than this simple statement. That said, the General Counsel in this case has not even proven an "established practice of granting raises every year." On the contrary, the stipulated facts reveal many years when some or all bargaining unit employees did not receive a wage increase at all. (Statement of Facts, ¶¶ 22-43.)

In short, the logic and outcome in neither *Raytheon* nor *Care One* prevents the Board from dismissing the complaint in this case. Indeed, dismissal is required by the logic and outcome in *Katz* and its progeny, given the stipulated facts presented to the Board in this case.

III. The Other Cases Cited by the General Counsel Are Also Distinguishable.

Aside from *Raytheon* and *Care One*, the General Counsel's brief cites a litany of other cases purportedly requiring a finding that Omni violated the Act, but those cases are distinguishable. As a matter of fact, the logic and holdings of those cases offer more support for Omni's position in this case than for the General Counsel's.

The D.C. Circuit's opinion in *Daily News*, for example, confirms *Katz*'s fundamental distinction between wage increases that are "automatic" (and therefore part of the status quo to be maintained between the parties during bargaining) and those that are "discretionary." *Daily News* also makes clear that "regular specified intervals" or longstanding temporal histories of wage increases do not alone require the continuation of wage increases during negotiations for an initial contract. 73 F.3d at 412 n.3 ("[W]e do not believe that fixed timing alone would be sufficient to bring the program under *Katz*."). Instead, to determine

whether historical wage increases were "automatic" and required to continue as part of the status quo, the Board considers whether there was a program for such wage increases, and if so, then also considers "the number of years that the program has been in place, the regularity with which raises [we]re granted, and whether the employer used fixed criteria to determine whether an employee w[ould] receive a raise, and the amount thereof." *Rural/Metro Medical Services*, 327 NLRB 49, 50 (1998).

The General Counsel's brief purports to describe at length the "long history" and "regular specific intervals" of wage increases at the Omni Chicago Hotel in either September or October, (G.C. Br. at 6), but this description distorts the facts. Between 2004 and 2008, Omni provided wage increases to most Food and Beverage Department ("F&B") employees on a bi-annual basis, with only one of those ten increases having occurred in September. (Statement of Facts, ¶¶ 17-29.) Then, those F&B employees who actually received a wage increase in 2009 received only one, in March. (*Id.* ¶¶ 30-31.) The next wage increase for any F&B employee did not occur until April 2010. (*Id.* ¶ 31.) Between 2010 and 2013, raises were once again given to most F&B employees on a bi-annual basis, and none of them occurred in September. (*Id.* ¶¶ 32-39.) Between 2014 and 2018, those F&B employees who received wage increases did receive them on September 1, (*Id.* ¶¶ 40-41, 43, 45, 47), but those few years are not enough to substantiate the General Counsel's claim of "regular specific intervals" when the factual record in the case is much more fulsome than that. At the same time, none of this accounts for the fact that some F&B employees

did not receive any increases at all for many years within this time frame. (*Id.* ¶¶ 22-43.) General Counsel's brief also argues that the amounts of past increases "have fallen within a narrow range of 3-4.2 percent, or 10-45 cents for tipped employees and 20 cents - $1.10 for not-tipped employees," (G.C. Br. at 2), but this once again ignores the employees who received no increase at all, and it ignores the significant difference between wage increases awarded in percentages and those figured in dollars-and-cents. While the General Counsel's brief argues that Omni's historical wage increases fit a clear pattern, the stipulated facts show something different.

Regardless, neither a narrow range of wage increases nor regular intervals of wage increases is sufficient to demonstrate a practice of wage increases requiring continued unilateral wage increases following a union's certification—not without fixed, objective criteria having driven those historical increases. None of the cases following *Daily News* and cited in the General Counsel's brief reached their conclusions without implicitly or explicitly identifying the same specific fixed criterion motivating the employer's historical increases. *See United Rentals, Inc.*, 349 NLRB 853 (2007); *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1996); *Rural/Metro Medical Services*, 327 NLRB 49 (1998); *TECO People Gas*, 364 NLRB No. 124 (2016). In *Daily News* itself and in *Rural/Metro Medical Services*, for example, employees received annual performance appraisals on their anniversary date and were awarded wage increases solely on the basis of their respective evaluations (*i.e.*, there was a wage increase program based on a single fixed criterion). *Daily News of Los Angeles*, 315 NLRB 1236, 1237-1241 (1994), enfd. 73

F.2d 406 (D.C. Cir. 1996); *Rural/Metro Medical Services*, supra, at 51. In *Bryant & Stratton*, supra, at 1018, the employer evaluated employees, either on their anniversary date or in July of each year, and granted wage increases on the basis of that evaluation (i.e., the same fixed criterion). In *TECO*, supra, slip op. at 4, merit raises were issued each December as determined by each employee's direct supervisor/coach based on that year's merit budget, the employee's performance, and the employee's status relative to the salary "midpoint" for their job classification. In *United Rentals*, supra, at 853-54, the employer granted merit-based wage increases after evaluating employees' performance and placing those scores in an electronic "merit matrix" that yielded particular wage increase amounts based on the employee's position, grade, corresponding salary band, performance rating, and the employer's budgeted amount for increases (i.e., fixed criteria). The present case does not present any of these scenarios; annual reviews have served as the basis, in whole or in part, for wage increase decisions for F&B employees only once in nearly 20 years, and that was in 2002. Meanwhile, the General Counsel has not established any other set of fixed criteria by which wage increases were granted in the past. The stipulated facts show that, in any given year, Omni granted wage increases or did not grant them, based on varying considerations entirely within its discretion.

The General Counsel's brief also cites *Central Maine Morning Sentinel*, 295 NLRB 376 (1989), for support, and while that case is distinguishable from the *Daily News* canon, in that *Central Maine* does not involve merit-based wage increases

based on annual performance reviews, it is nevertheless inapplicable here. In *Central Maine*, the Board found that the employer unilaterally withheld a wage increase whereas previously the employer "did not deviate from year to year in deciding that a raise would be granted; it applied a formula derived from uniform factors across-the-board and granted it to *all employees* whose wages were not governed by collective bargaining agreements." 295 NLRB at 379 (emphasis added). That formula was based on a "comparison with wage rates offered by comparable newspapers in the area and the condition of the nation, state, and local economy." *Id.* at 378. The history of wage increases for the F&B employees at the Omni Chicago Hotel, however, reveals no formula, no uniform factors, and no consistent granting of a wage increase to all employees. In contrast, the stipulated facts show that, over at least the 17 years prior to the Union's election, Omni has decided whether and when to grant F&B employees a wage increase, and, if so, how much to provide them, by considering various factors, which have varied inconsistently over time, with no clear formula or criteria driving the decision. (Stipulation of Facts ¶ 49.)

The General Counsel's brief also cites *Lee's Summit Hospital*, 338 NLRB 841 (2003), for support, but in *Lee's Summit*, the Board found that the employer had a years-long practice of granting a wage increase based solely on "market conditions" (i.e., a single, consistent criterion). 338 NLRB at 843. Between 1994 and 2000 (when the union was certified), with the exception of 1995, the employer granted a

general wage adjustment to all employees at its facilities in the amount of 2%, 2.5%, 3%, 3%, and 3% based on that criterion. *Id.*

These facts are materially distinguishable from the facts in the instant case. First, between 2006 and 2018, only twice (in 2017 and 2018) did all bargaining unit employees at the Omni Chicago Hotel receive a wage increase. Second, F&B employees at the Omni Chicago Hotel have seen wage increases ranging from 10¢ to $1.10, which the General Counsel does not show to be on par with the narrow range of increase amounts in *Lee's Summit* (between 2 and 3%). In addition, unlike here, the employer in *Lee's Summit* relied on a single fixed criterion (market conditions) to determine its wage increases, whereas the Omni Chicago Hotel's historical decisions to increase wages for F&B employees, if at all, have been made based on no fixed criteria. Instead, the decisions have been made based various and varying considerations, including the budgeted, forecasted, and actual economic performance of the hotel, employees' individual job performance reviews, statutory minimum wage requirements, and wage rates offered by comparable hotels in the Chicago area, with each of these considerations being more or less important (or, at times, not even considered at all), depending on the circumstances. (Statement of Facts, ¶ 49.)

Likewise, the employer in *Missions Foods*, 350 NLRB 336 (2007), annually used a single fixed criterion (a telephone survey of other area companies to assess wage levels in the local market) for at least four years to determine a "structural scale increase" for its employees, and the Board found the structural scale increase to be

a term and condition of employment accordingly. 350 NLRB at 337-38. Here, again, there has been no comparable fixed criterion.

To draw a direct analogy to *Mission Foods*, the General Counsel's brief invokes—improperly—email correspondence between counsel for the Hotel and the Board investigator contained in Joint Exhibit I. The General Counsel's brief claims that

> while Respondent may have taken into account various considerations, including profitability and local area wage rates, the evidence reveals that remaining competitive in the labor market **(i.e. area wage surveys)** was the principal factor, as directed by its corporate office. During the investigation of the underlying charge, the investigating Board Agent specifically asked Respondent "how wage increases were determined." In response, Respondent's attorney submitted that the "motivating factor" in calculating wage increases was to "attract and retain talent."

(G.C. Br. at 8) (internal citations omitted) (emphasis added). This argument should be rejected on a number of grounds.

First, under the Board's decision in *Kaiser Aluminum*, 339 NLRB 829 (2003), the January 21, 2020, e-mail from counsel to Region 13 is privileged as attorney work product within the meaning of Rule 26(b)(3) of the Federal Rules of Civil Procedure. As one ALJ pointed out in *UNITE HERE (Sam's Town Hotel and Gambling Hall Tunica)*, there is "no logical reason why a position statement submitted by the lawyer for one party should be accorded the privilege but the position statement submitted by the lawyer for another party should not. Indeed, it would seem not merely asymmetrical but unfair for the position statement of one party's lawyer to be accorded the privilege but a similar statement from the other party's lawyer to be

denied the privilege." 357 NLRB 38, 41 (2011). Accordingly, counsel's email is inadmissible.

Regardless, even if the email is considered, it does not support the broad argument in the General Counsel's brief. In no way does the email assert that each year the "motivating factor" in calculating wage increases was to "attract and retain talent." (*Compare* G.C. Br. at 7 *with* Joint Exhibit I.) Only in reference to the years 2017 and 2018 does the email mention that the "the motivating factor was the desire to remain competitive in the Chicago hotel labor market." (*Id.)* What may have been the "motivating factor" for two particular years is not determinative when there are 15 more years of historical decision-making to be considered (especially when the amounts and method of calculating wage increases those two years differed so substantially). (Statement of Facts, ¶¶ 14-49.)

Furthermore, a "motivating factor" of "remain[ing] competitive" in the local market does not come close to any of the specific "fixed" criteria found in the cases cited by the General Counsel's brief. Even in *Mission Foods*, where local competitiveness was the employer's objective, the employer had a specific fixed practice of "conducting a telephone survey of other area companies to assess wage levels in the local market." 350 NLRB at 336. The General Counsel has not established any such specific practice in this case.

Most important, the parties have presented the Board with a stipulated record in this case, and it bears repeating again what this stipulated record says: for more than 15 years, the Company's decisions with respect to granting wage increases to

F&B employees have been made based on various and varying considerations, including the budgeted, forecasted, and actual economic performance of the hotel, employees' individual job performance reviews, statutory minimum wage requirements, and wage rates offered by comparable hotels in the Chicago area, with each of these considerations being more or less important (or, at times, not even considered at all), depending on the circumstances. (Statement of Facts, ¶ 49.) That stipulated fact supersedes an e-mail sent during the Region's investigation, and that stipulated fact is the fact upon which the Board's decision must rest. That fact shows that the Company has exercised significant discretion over the course of more than 15 years when it comes to deciding whether and when to grant wage increases and how much of a wage increase to grant. Further, the other stipulated facts in the record demonstrate that this discretion has caused significant fluctuations in the amount of the wage increases granted, how many are granted in any given year, who receives them, and even whether a wage increase is granted at all. (*Id.* ¶¶ 14-49.)

On these facts, under extant law, it was not unlawful for Omni to maintain employees' existing wage rates during first-contract negotiations and to reject the Union's insistence that the Hotel must grant an unspecified wage increase on September 1, 2019, without the Union's having to negotiate for it. The Company did not violate the duty to bargain in good faith.

CONCLUSION

Based on the fundamental premises established by the Supreme Court nearly 60 years ago in *Katz*, there is no legal basis for requiring Omni to grant a wage increase to bargaining unit employees while the parties negotiate over the terms to be contained in their first contract. The Board should dismiss the Complaint in its entirety.

Respectfully submitted this 29th day of September, 2020.

OMNI HOTELS MANAGEMENT CORPORATION

By: s/Brian Stolzenbach

Certificate of Service

I hereby certify that I caused a true and correct copy of Respondent's Answering Brief Pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations to be e-filed with the National Labor Relations Board and served on the following individuals via e-mail on this 29th day of September, 2020.

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